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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1301

GANNETT CO., INC., *Petitioner*

v.

THE HONORABLE DANIEL A. DEPASQUALE, AS JUDGE OF THE SENECA COUNTY COURT, ET AL., *Respondents*

BRIEF OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INDEX

	Page
PRELIMINARY STATEMENT	1
INTEREST OF THE AMICI CURIAE	1
QUESTIONS PRESENTED, CONSTITUTIONAL PROVISIONS INVOLVED AND STATEMENT OF THE CASE	2
ARGUMENT	3
No Part of a Criminal Proceeding May Be Closed to the Public and Press in the Absence of a Substantial and Specific Factual Showing That Revelation of the Matters Adduced at Such a Proceeding Will Pose a Clear and Present Danger to the Administration of Justice	3
Under the Decisional Authorities of This Court, the Holding of the New York Court of Appeals is Violative of the First and Sixth Amendments by Shifting to the Press and Public the Burden of Persuasion with Respect to Their Right to Attend "Presumptively Open" Judicial Proceedings	9
CONCLUSION	20

TABLE OF CITATIONS

CASES:

Beck v. Washington, 369 U.S. 541 (1962)	7
Bennett v. Rundle, 419 F.2d 599 (3d Cir. 1969)	5, 12
CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975)	5
Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976)	7
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	5, 11, 13
Craig v. Harney, 331 U.S. 367 (1947)	5, 14
Elrod v. Burns, 427 U.S. 347 (1976)	9
Estes v. Texas, 381 U.S. 532 (1965)	17
E. W. Scripps Co. v. Fulton, 100 Ohio App. 157, 60 Ohio Ops. 147, 125 N.E.2d 896, app. dism'd, 164 Ohio St. 261, 130 N.E.2d 701 (1955)	14

Page

Irvin v. Dowd, 366 U.S. 717 (1961) 16, 18
Kusper v. Pontikes, 414 U.S. 51 (1973) 9
Marshall v. United States, 360 U.S. 310 (1959) 17
Murphy v. Florida, 421 U.S. 794 (1975) 17
Nebraska Press Association v. Stuart, 427 U.S. 539 (1976) .....*passim*
New Jersey v. Allen, 73 N.J. 132, 373 A.2d 377 (1977) . 10
N. Y. Times Co. v. United States, 403 U.S. 713 (1971) . 6
Oklahoma Pub. Co. v. District Court of Oklahoma County, —— U.S. ——, 97 S.Ct. 1045 (1977) 11
In Re Oliver, 333 U.S. 257 (1948) 13
Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) 5
Rideau v. Louisiana, 373 U.S. 723 (1963) 17
Schenck v. United States, 249 U.S. 47 (1919) 5
Sheppard v. Maxwell, 384 U.S. 333 (1966) 7, 13, 17, 18
Singer v. United States, 380 U.S. 24 (1965) 14
United Press Association v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954) 14
United States v. American Radiator & Standard San. Corp., 274 F. Supp. 790 (W.D.Pa.), aff'd, 388 F.2d 201 (3d Cir. 1967), cert. denied, 390 U.S. 922 (1968) 14
United States v. CBS, Inc., 497 F.2d 102 (5th Cir. 1974) 5
United States v. Cianfrani, (3d Cir., 1978, Nos. 77-2245 & 77-2462, decided Mar. 16, 1978) .....*passim*
United States v. Clark, 475 F.2d 240 (2d Cir. 1973) .. 13
United States ex rel. Darcy v. Handy, 351 U.S. 454 (1956) 7
United States v. Kobli, 172 F.2d 919 (3d Cir. 1949) .. 14

OTHER AUTHORITIES:

ABA Adjunct Committee on Fair Trial/Free Press, *Standards Relating to Fair Trial and Free Press*, § 3.2 (Approved Draft, February, 1978) 8

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PRELIMINARY STATEMENT

The American Newspaper Publishers Association and Reporters Committee for Freedom of the Press submit this brief amici curiae in support of Petitioner Gannett Co., Inc. All parties to this suit have given their written consent to the filing of this brief. Copies of such consents have been filed with the Clerk of this Court.

INTEREST OF THE AMICI CURIAE

The American Newspaper Publishers Association (ANPA) is a non-profit membership corporation or-

ganized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1285 newspapers constituting over 90 percent of the total daily and Sunday newspaper circulation and a significant portion of the weekly newspaper circulation in the United States. Twenty daily or weekly newspapers owned by Gannett Co., Inc., as well as forty-five other newspapers published throughout the State of New York, hold membership in ANPA. Concerned with the issues of general significance to the profession of journalism and the newspaper publishing business, ANPA seeks to keep its members informed of, and provide meaningful input on, specific matters relating to these concerns.

The Reporters Committee for Freedom of the Press is a legal research and defense fund of working reporters and news editors primarily dedicated to defending the First Amendment and freedom of information interests of the press to report on and the public to receive news.

The Committee and ANPA enter this case as amici curiae in support of the Petitioner because they strongly agree with the dissenting opinion of the New York Court of Appeals that the majority opinion will signal the routine establishment of secret pretrial proceedings in the State of New York in violation of First and Sixth Amendment rights of the public and the press.

QUESTIONS PRESENTED, CONSTITUTIONAL PROVISIONS INVOLVED AND STATEMENT OF THE CASE

Your amici adopt the questions presented, constitutional provisions involved and statement of the case, as set forth in the Petition of Gannett Co., Inc.

NO PART OF A CRIMINAL PROCEEDING MAY BE CLOSED TO THE PUBLIC AND PRESS IN THE ABSENCE OF A SUBSTANTIAL AND SPECIFIC FACTUAL SHOWING THAT REVELATION OF THE MATTERS ADDUCED AT SUCH A PROCEEDING WILL POSE A CLEAR AND PRESENT DANGER TO THE ADMINISTRATION OF JUSTICE

The motions for closure made by the defendant, and joined in by the prosecution, at the *Huntley* hearing below were completely unsupported by any showing that a failure to close the proceedings posed a "serious and imminent threat of interference with a fair trial" or "would create a clear and present danger of influencing the jury verdict." Nevertheless, Judge DePasquale granted the motions since "matter [might] come up . . . that [might] be prejudicial to the defendant . . . ." Petition at 31a. This ruling was in blatant disregard of the First Amendment interests necessarily affected by the closure order. This initial error, egregious as it was, has now been compounded in the decision of the New York Court of Appeals.

In its opinion, the New York Court of Appeals, while paying lip service to the First Amendment values at stake, held that a trial or hearing judge—"[a]s the locus of public interest"—has absolute discretion to close his courtroom to the public and the press, and this discretion may be exercised in the absence of any showing whatsoever that public revelation of the anticipated testimony or evidence poses a clear and present danger to the administration of justice. Ignoring one of the most basic principles of law—*i.e.* that the rulings of a trial or hearing judge must be based only on the evidence properly presented to the court—the New York Court of Appeals has held that a hearing judge, having been presented with

no evidence as to the potentially prejudicial effect of the public release of information, may, nevertheless, take into consideration his own knowledge, however derived, of the extent of past publicity and base his ruling thereon. Even more incredible, the hearing judge is invested with authority "to distinguish mere curiosity from legitimate public interest" and, whenever he determines that the public's interest results from anything less than an "overwhelming" legitimate public interest, close the proceedings to the public and the press. Petition at 11a. Such a perversion of judicial process, coupled with the total disregard of First Amendment guarantees, is clearly contrary to law and the decisions of this Court.

While the New York Court of Appeals made some reference to the guarantees of the First Amendment and this Court's decisions concerning those guarantees, that court's opinion, ultimately, must be construed as a declaration that First Amendment values and interests are not implicated, nor worthy of consideration, in a hearing judge's decision to close a pretrial criminal proceeding:

> "Of primary consideration is the public's interest in avoiding any developments that would threaten to truncate a defendant's right to a fair trial. This concept is premised on the right to an impartial jury as the arbiter of guilt or innocence." Petition at 10a-11a.

It is clear, however, that First Amendment values are at issue in a court's decision to close pretrial criminal proceedings, and that the Sixth Amendment, rather than mandating closure, demands the "openess" required by the First Amendment. *United States* v. *Cianfrani,* (3d Cir., 1978, Nos. 77-2245 and 77-2462,

decided Mar. 16, 1978), Slip Opinion at 18 (Sixth Amendment requires that pretrial criminal procedings be open to the public); *accord, Bennett* v. *Rundle,* 419 F.2d 599, 606 (3rd Cir. 1969); *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975) (press, under First Amendment, has responsibility to report proceedings of the courts).

Although the trial court, in the instant case, concluded in its oral ruling that "these matters are in the nature of a *Huntley* hearing and . . . not the trial," what transpires in a *Huntley* hearing is clearly of legitimate public interest, and the public's right to obtain information in regard thereto may not be infringed, absent a showing by the Respondent of some compelling and overriding state necessity. *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539, 561, 590-591, 593 (1976); *Schenck* v. *United States,* 249 U.S. 47, 52 (1919); cf., *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, 419 (1971).

Where that compelling and overriding state necessity is the avoidance of pretrial publicity, purportedly prejudicial to a defendant's Sixth and Fourteenth Amendment right to a fair trial, the attendance of the press at a *Huntley* hearing and the publicity which presumably will result therefrom "must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." *Craig* v. *Harney,* 331 U.S. 367, 376 (1947). See also *CBS Inc.* v. *Young,* 522 F.2d 234 (6th Cir. 1975); *U.S.* v. *CBS Inc.* 497 F.2d 102 (5th Cir. 1974). Yet, in justification of its order permitting secret judicial proceedings, the trial court below merely adverted to the fact

that "[c]ertain evidentiary matters may come up in the testimony of people's witnesses that may be prejudicial to the defendants . . . ." Petition at 4a. Obviously the substantial restraint imposed upon press freedoms by permitting secret judicial proceedings cannot be based upon such supposition and conjecture.[1] See. *N.Y. Times Co.* v. *U.S.*, 403 U.S. 713, at 725-726 (1971) (Brennan, J., concurring opinion). There must be a substantial and specific factual showing by the movant that revelation of the anticipated testimony or evidence *will* threaten the fair administration of justice, and the burden of making such a showing is clearly on the movant.

In *Nebraska Press Association* v. *Stuart,* 427 U.S. 539 (1976), Justice Powell emphasized "the unique burden that rests upon the party, whether it be the State or a defendant, who undertakes to show the necessity for prior restraint on pretrial publicity." 427 U.S. at 571 (Powell, J. concurring). Chief Justice Burger stated that this Court, when reviewing orders concerning pretrial publicity, "must examine the evidence before the trial judge when the order was entered . . . ," 427 U.S. at 562, and must assess "the

[1] A similarly conjectural justification for secret judicial proceedings was offered by New York State Court of Appeals:

> "Knowing how damaging the introduction of this evidence *could be* to a defendant, and the widespread knowledge even of inadmissable evidence *could* nonetheless predetermine guilt (e.g., *Sheppard* v. *Maxwell, supra*), we require the trial judge to ensure that tainted evidence never see the light of day."
>
> • • •
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> "To allow public disclosure of *potentially* tainted evidence . . . is to involve the court itself in the illegality. This potential taint of its own process can neither be condoned nor countenanced." Petition at 8a, 10a.

adequacy of the showing made . . . ." 427 U.S. at 569. In *Nebraska Press,* considerable evidence was presented to the trial judge (427 U.S. at 562), and the Nebraska Supreme Court had a full evidentiary record on which to base its review (427 U.S. at 583 n.10). In the instant case, there was no evidence presented to the hearing judge and no evidentiary record which the New York Court of Appeals could review.

In considering challenges to criminal convictions wherein the defendant has maintained that pretrial publicity prejudiced the jury, this Court has repeatedly held:

> ". . . it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality."

United States ex rel. Darcy v. *Handy,* 351 U.S. 454, 462 (1956); see also, *Beck* v. *Washington,* 369 U.S. 541, 558 (1962).

While your amici believe that judicious use of the alternative means (*i.e.,* means other than restrictions on the press) discussed in *Nebraska Press* and *Sheppard* v. *Maxwell,* 384 U.S. 333 (1964), will be sufficient to protect against potential prejudicial effects on a jury or venire, it is submitted that, if a pretrial hearing or trial may be closed to the public and press, such a closing may be ordered only if: 1) there has been a substantial and specific factual showing that release of information will pose a "serious and imminent threat of interference with a fair trial," *Chicago Council of Lawyers* v. *Bauer,* 522 F.2d 242

(7th Cir. 1975), *cert. denied,* 427 U.S. 912 (1976); 2) the threatened interference has been demonstrated with "the requisite degree of certainty to justify restraint," *Nebraska Press* at 569-70; and 3) the threatened prejudicial effect of such information on potential jurors cannot be avoided by alternative means. See, ABA Adjunct Committee on Fair Trial/ Free Press, *Standards Relating to Fair Trial and Free Press* § 3.2 (Approved Draft, February, 1978).

In the instant case there was no factual showing of any kind, there was no demonstration of the certainty of the threatened interference, and there was no consideration of whether the use of alternative means might avoid any potential prejudice. The New York Court of Appeals failed to address any of these factors as they applied to the closure order issued by Judge DePasquale. Rather, that court, although starting with the premise that "[c]riminal trials are presumptively open to the public," Petition at 5a, concluded with the premise that pretrial evidentiary hearings are presumptively to be closed to the public unless the public has an overwhelming interest in keeping the proceedings open. Petition at 10a-11a. In so concluding, that court has rendered the First Amendment a second class right subservient to the asserted guarantees of the Sixth Amendment in this case.

This Court has flatly refused to assign priority as among the competing interests of the First and Sixth Amendments:

> "The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other . . . it is not for us to rewrite the Constitution by undertaking what they declined to do."

Nebraska Press Association v. *Stuart,* 427 U.S. at 561. If the decision of the New York Court of Appeals is permitted to stand, the resultant effects will be devastating to the freedom of the press and the public's right to be informed.

UNDER THE DECISIONAL AUTHORITIES OF THIS COURT, THE HOLDING OF THE NEW YORK COURT OF APPEALS IS VIOLATIVE OF THE FIRST AND SIXTH AMENDMENTS BY SHIFTING TO THE PRESS AND PUBLIC THE BURDEN OF PERSUASION WITH RESPECT TO THEIR RIGHT TO ATTEND "PRESUMPTIVELY OPEN" JUDICIAL PROCEEDINGS.

The opinion of the New York State Court of Appeals below is clearly erroneous and should be reversed. It approves the closure of a preliminary hearing under factual circumstances which are patently insufficient under the standards set forth by this Court in *Nebraska Press Ass'n* v. *Stuart, supra.* Moreover, the opinion establishes a judicial approach to the issue of closing proceedings in New York State which subverts the venerable principle of constitutional law that governmental activity in derogation of First Amendment freedoms "cannot be justified upon a mere showing of a legitimate state interest." *Kusper* v. *Pontikes,* 414 U.S. 51, 58 (1973). In order to justify state infringement of First Amendment freedoms, "[t]he [state] interest advanced must be paramount, one of vital importance, *and the burden is on the government to show the existence of such an interest." Elrod* v. *Burns,* 427 U.S. 347, 362 (1976) (emphasis added).

The New York State Court of Appeals has sought to legitimize its lesser showing of cause for the instant closure order by distinguishing this case from that presented to this Court in *Nebraska Press Association* v. *Stuart, supra.* It differentiates between a "gag order" prohibiting dissemination of information gleaned in open court and an order which closes pretrial proceedings, thereby cutting off press access to the information in the first place. Respondent and the New York Court of Appeals therefore assert that a lesser infringement of First Amendment values is involved in the instant case. Yet it is clear, from the standpoint of the press, that although closure of proceedings may be characterized as an "indirect restraint," it achieves the same result as a gag order and in effect constitutes a prior restraint on newsgathering and, *ipso facto,* news dissemination by the press. As cogently expressed by the New Jersey Supreme Court:

> "The fact that the United States Supreme Court has chosen to emphasize that press 'gags' were imposed on reporting events which transpired in open court . . . should not be used as a justification for closing court proceedings to the press and the public. It must be realized that the use of closed proceedings has the capacity to subvert the entire effect of [decisions barring impositions of prior restraints—in form of gag orders—upon the press]." *New Jersey* v. *Allen,* 73 N.J. 132, 373 A.2d 377 (1977).

For to permit a trial court to conduct a *Huntley* hearing *in camera,* merely upon the fear and supposition that not to do so, "would threaten the impaneling of a constitutionally impartial jury in the county of

venue", is to eviscerate the protections for the press recognized by this court in *Nebraska Press Association* v. *Stuart, supra,* and *Oklahoma Pub. Co.* v. *District Court of Oklahoma County,* —— U.S. ——, 97 S.Ct. 1045 (1977).

Moreover, implicated in an order to close judicial proceedings are important societal interests which are derived not only from the First Amendment right to gather and disseminate news, but from the public trial requirement of the common law and Sixth Amendment as well. See, *United States* v. *Cianfrani,* Crim. No. 77-142 (3rd Cir. 1978) (Slip Opinion at 14-24). The protections against police and judicial misconduct, perjury and the appearance of injustice accorded by the public trial requirement under common law and the Sixth Amendment "are often separate from—and in some cases [admittedly] antagonistic to—the interests of a defendant in a particular criminal case." *Id.,* at 27. Yet this court has recognized that these protections are "of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business." *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 495 (1975).

Consequently,

> "any motion that seeks to close any portion of a proceeding subject to the public trial requirement of the sixth amendment, or to seal any portion of the record thereof, may be granted only after full and fair consideration by the court of the important public policies that the sixth amendment protects." *United States* v. *Cianfrani, supra,* at 30.

Thus, "any claim of practical justification for a departure from the constitutional requirement of a

public trial must be tested by a standard of strict and inescapable necessity," *Bennett* v. *Rundle,* 419 F.2d 599, 607 (3rd Cir. 1969) (en banc), and "any order of exclusion must extend no farther than the circumstances strictly warrant in order to meet the asserted justification for closure." *U.S.* v. *Cianfrani,* supra, at 30.

Nevertheless, although "the decisions reached in most suppression hearings do not turn upon [or necessarily require disclosure of] the contents of the communication at issue," *id.,* at 39, Respondent excluded the public from the entire proceeding and sealed the resultant record. This error was compounded by the New York Court of Appeals when it approved this "remedy" on the grounds that Respondent was "not presiding over a trial on the merits," and the societal interest in the public trial requirement is "somewhat attenuated in comparison with defendants' self-interest." (Petition 8a, 6a). The decision of the New York Court of Appeals clearly fails to consider adequately "the important public policies that the sixth amendment protects", id., at 30, and to limit the destructive impact on those policies resulting from Respondent's closure order.

The New York State Court of Appeals decision is also defective in that it erroneously assigns to the trial court, in ruling on motions for the closure of proceedings, the function of "distinguish[ing] mere curiosity from legitimate public interest." Petition at 11a. Your amici respectfully submit that the degree of the public's prior interest or disinterest in a particular proceeding cannot be a determining factor dictating the closure of "presumptively open" court proceedings. The trial court may

not "involve [itself] in an ad hoc evaluation of the need for the public to receive particular information that might nevertheless implicate the accused as the perpetrator of a crime." *Nebraska Press Association, supra,* at 605 (Brennan, J., concurring opinion). For regardless of the dignity, gravity, or propriety of the public's interest in a particular criminal proceeding, important benefits may result from press coverage of events leading up to and surrounding a criminal trial. See, *Nebraska Press Association, supra,* at 605-606 (Brennan, J., concurring opinion); *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469,491 (1975); *In Re Oliver,* 333 U.S. 257, 266, 270 (1948); *United States* v. *Clark,* 475 F.2d 240, 247 (2d Cir. 1973).[2]

> "[T]he press does not simply publish information about trials [to satisfy public curiosity] but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Sheppard* v. *Maxwell,* 384 U.S. at 349-350 (1966).

In recognition of this fact, various courts have determined that the guarantee of a public trial is not solely a right of the accused; nor is it a right which may be waived by agreement between the accused

[2] "To exempt pretrial suppression hearings . . . from the public trial provision thus raises the possibility that critical proceedings will be insulated from public view without a showing sufficient to overcome the sixth amendment's requirements. When decisions crucial to the outcome of the entire criminal case are made at such proceedings, all of the policies outlined above in support of the open trial requirement apply with full force, the need to make the trial accessible to unknown parties who might have important knowledge to bring to light, the need to subject the judiciary to public scrutiny in the performance of its duties, and the need to provide the 'appearance of justice' in order to foster confidence in the judicial system." *United States* v. *Cianfrani,* Crim. No. 77-142 (3rd Cir. 1978) (Slip Opinion at 22).

and the prosecutor who may be fearful that pretrial publicity will result in reversal of a conviction on appeal. Although under certain circumstances, a defendant may waive his constitutional right to a public trial, he has no absolute right to compel a private trial. See, *Singer* v. *United States,* 380 U.S. 24, 34-35 (1965); *United States* v. *Cianfrani,* Crim. No. 77-142 (3rd Cir. 1978); *United States* v. *American Radiator & Standard San. Corp.* 274 F.Supp. 790, 794 (W.D. Pa.), aff'd 388 F.2d 201 (3rd Cir. 1967), cert. den., 390 U.S. 922 (1968); *United States* v. *Kobli,* 172 F.2d 919, 924 (3rd Cir. 1949); *E.W. Scripps Co.* v. *Fulton,* 100 Ohio App. 157, 60 Ohio Ops. 147, 125 N.E.2d 896, app. dism'd, 164 Ohio St. 261, 130 N.E.2d 701 (1955). See contra, *United Press Association* v. *Valente,* 308 N.Y. 71, 123 N.E. 2d 777 (1954).

"There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to supress, edit, or censor events which transpire * * * before it," *Craig* v. *Harney,* 331 U.S. 367, 374 (1947); and a waiver by the defendant is no substitution for a finding by the court that there exists a clear and present danger to the conduct of a fair trial and that alternative, less drastic means of preserving a fair trial are unavailing.

The N.Y. State Court of Appeals has reversed the constitutionally-mandated burden of persuasion in respect of obtaining closure of pretrial proceedings. Under its holding, when faced with a defendant's attempted waiver of his Sixth Amendment right to a public trial and undocumented speculation as to the adverse impact of pretrial publicity, a trial court may require the press and public to justify their right to attend a judicial proceeding.

By shifting this burden to the press, courts in New York State are now relieved of their duty to ascertain whether public disclosure of certain facts will actually create impermissible juror partiality in violation of the defendant's right to a fair trial. Instead, a conclusory allegation "that there [is] indeed a risk that pretrial news account . . . [will] have some adverse impact on the attitudes of . . . jurors", *Nebraska Press Ass'n, supra* at 568-569, now obliges the press in New York to demonstrate that the interest of the public in facts concerning a particular proceeding transcends "mere curiosity" and is of sufficient "magnitude . . . to outweigh the risks of premature disclosures." Petition at 11a. It is respectfully submitted that this Court must resist this attempt to shift the burden of proof from the state to those who would exercise their First Amendment freedoms. Failure to do so would result in "the creation of a new, potentially pervasive exception to the settled rule of virtually blanket prohibition of prior restraints." *Nebraska Press Ass'n, supra,* at 594 (Brennan, J., concurring opinion). For the same spectre of widespread restraint inherent in judicial approval of "gag orders" based upon unspecified, conclusory grounds also exists with respect to arbitrary closures:

> "The incentives and dynamics of the system of prior restraints would inevitably lead to overemployment of the technique. In order to minimize pre-trial publicity against his clients and pre-empt ineffective-assistance-of counsel claims, counsel for defendants might routinely seek such restrictive orders. Prosecutors would often acquiesce in such motions to avoid jeopardizing a conviction appeal. And although judges could readily reject many such claims as frivolous, there would be a significant danger the judges would

nevertheless be predisposed to grant the motions, both to ease their task of ensuring fair proceedings and to insulate their conduct in the criminal proceeding from reversal.

* * *

And, . . . given the financial disincentives, particularly on the smaller organs of the media, to challenge any restrictive orders once they are imposed by trial judges, there is the distinct possibility that many erroneous impositions would remain uncorrected." Id. at 608, 610.

Thus, the lower court's opinion constitutes a dangerous departure from established law by requiring the press to show why it should not be restrained, whenever its scrutiny of our "presumptively open" judicial system may lead to "commentary [that] would threaten the impaneling of a constitutionally impartial jury in the county of venue . . . ." Petition at 10a.

A fundamental error in the lower court's analysis giving rise to this dangerous precedent is its misconception of current standards for assessing juror impartiality or threats thereto.

> "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors . . . 'A fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison,* 349 U.S. 133, 136. . . . In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co Litt 155 b. His verdict must be based upon the evidence developed at the trial." *Irvin* v. *Dowd,* 366 U.S. 717, 722 (1961).

Yet, the State Court of Appeals has failed to understand that

> "[i]t is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. *To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard.* It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Id. at 722-723 (emphasis added). See also, *Nebraska Press Ass'n* v. *Stuart, supra,* at 554: ("[T]hese cases demonstrate that pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial"); *Murphy* v. *Florida,* 421 U.S. 794,799 (1975) ("[E]xposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged [does not] alone presumptively deprive the defendant of due process.").[8]

Respondent, noting that there had been local publicity concerning the fugitives' confessions, adopted

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[8] Very few cases—all involving far more egregious patterns of pretrial publicity than is present herein—have equated pretrial publicity with prejudice. See *Rideau* v. *Louisiana,* 373 U.S. 723 (1963); *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966); *Estes* v. *Texas,* 381 U.S. 532 (1965). Moreover, the "federal supervisory standard," whereby persons who have learned from news sources of a defendant's prior criminal record are presumed to be prejudiced, does not apply to state prosecutions. See: *Marshall* v. *United States,* 360 U.S. 310 (1959).

the "impossible standard" of presumptive prejudice adverted to in *Irvin, supra,* and, without detailed inquiry as to actual prejudice generated among the citizenry in the local venue, found the "reasonable possibility of prejudice to the defendants" to be a sufficient basis for the extraordinary act of closing to the public a judicial proceeding. In so doing, respondent clearly failed to examine in any meaningful way "(a) the nature and extent of pretrial coverage; [and] (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity. . . ." *Nebraska Press Ass'n, supra,* at 562. It must be remembered that even where a trial court may "reasonably conclude . . . that publicity might impair the defendant's right to a fair trial," Id. at 563, hurdles to the entry of an order previously restraining the collection or dissemination of news concerning judicial proceedings remain. See, *Nebraska Press Ass'n, supra,* at 564-565. Inasmuch as "[s]ecrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges," Id. at 587, alternative and less drastic remedies must first be considered:

> "[W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity." *Sheppard* v. *Maxwell,* 384 U.S. 333, 363 (1966).

The First Amendment protects one of the fundamental liberties which must be accorded the broadest scope possible, consistent with maintaining an ordered society. Thus, in order to avoid the establishment of a precedent which subordinates this liberty to specula-

tive concerns as to a defendant's right to a fair trial, and which is capable of future abuse, it clearly would have been preferable to conduct the *Huntley* hearing in public and address the threat of impermissible juror prejudice at trial, where all the alternative remedies thereto would still be available, but a more searching inquiry as to juror prejudice may be conducted on *voir dire.*[4] In their haste to find an ironclad means whereby the asserted threat of juror prejudice may be prevented, Respondent and the New York Court of Appeals have run roughshod over the public's right to be informed by the press on matters of great public interest; Respondent and the New York Court of Appeals have established a precedent which, if permitted to stand, "will inevitably interject judges at all levels into censorship roles that are simply inappropriate and impermissible under the First Amendment." *Nebraska Press Ass'n, supra,* at 607.

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[4] Oftentimes, the Court's inquiry into the voluntariness of a criminal defendant's confession or the admissibility of physical evidence can be conducted without disclosing the contents of the statement or the nature of the evidence. *U.S.* v. *Cianfrani, supra,* at 39-40. Moreover, "[i]t may be that such incriminating material would be of such slight news value or so inflammatory in particular cases that responsible organs of the media, in an exercise of self-restraint, would choose not to publicize that material, and not make the judicial task of safeguarding precious rights of criminal defendants more difficult." *Nebraska Press Ass'n, supra,* at 612-613 (Brennan, J., concurring opinion). Finally, before entering an order removing a judicial proceeding from public scrutiny, the court must determine "how effectively [the] restraining order would operate to prevent the threatened danger." Id. at 562. Although the threatened danger below was the possibility that local veniremen might become impermissibly prejudiced, inasmuch as the local community was already aware of the fact that confessions had been made, closure of the *Huntley* hearing arguably could not have prevented the threatened danger as effectively as the less drastic remedies of continuance or change of venue. In any event, the necessary finding as to the efficacy of such alternative remedies was not made. *Nebraska Press Ass'n, supra,* at 562.

CONCLUSION

It is respectfully submitted that this Court grant the petition for writ of certiorari in order that the substantial constitutional questions raised therein can be fully examined.

Respectfully submitted,

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